Occupational Disease Evaluations

The Workers' Compensation Claims Assistance Bureau of the ERD is responsible for the Occupational Disease (OD) evaluation process. The process is used to determine whether a claimant's condition is a result of the employment and to determine compensability of claims under the OD statutes when an insurer has not accepted liability for the claim.

The process requires the claimant to attend a medical evaluation directed by the department. The medical evaluator submits a report of findings to the department. A copy of the report is then sent to the claimant and the insurer. If a dispute still exists over initial compensability as an OD, it is a dispute subject to the jurisdiction of the Workers' Compensation Court (WCC).

Exhibit 5.1

Occupational Disease Evaluations

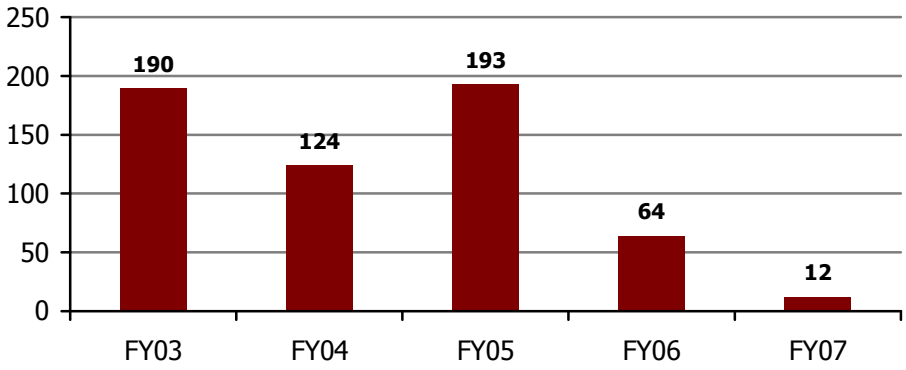
By Plan Type[1] and Fiscal Year of Request

Plan Type	FY03	FY04	FY05	FY06	FY07
Plan 1	30	25	38	10	5
Plan 2	64	28	54	19	5
Plan 3	96	71	101	35	2
Total	***190***	***124***	***193***	***64[2]***	***12***

Exhibit 5.2

Total Occupational Disease Cases

By Fiscal Year



Notes:

[1]Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance and Plan 3 – Montana State Fund

[2]The number of department evaluations has decreased due to repeal of the OD Act for injuries on or after 7/1/05. After 7/1/05, disputes go to mediation and then to the WCC.

Mediation

The Workers' Compensation Mediation Unit of ERD administers a mandatory process for resolving disputes dealing with benefits for both occupational injury and occupational disease claims. The mediation process is confidential, non-binding and informal. The mediator facilitates the exchange of information between the parties and assists with solutions aimed at resolving the dispute. Conferences are held either in person in Helena or by telephone. Often more than one conference is held in order to resolve the disputes on a claim. In FY07, the Mediation Unit received and processed 1,312 petitions, which involved 1,485 claims. A petition is a request for mediation and may include multiple claims.

Exhibit 5.3

Claims in Mediation - FY07

By Plan Type[1]

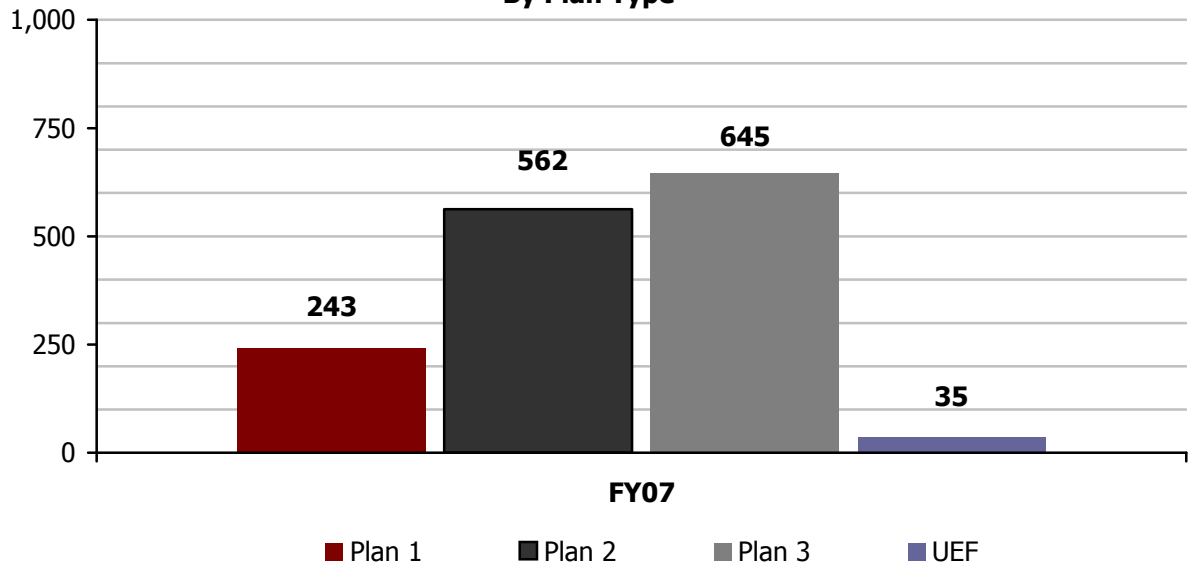


Exhibit 5.4

Claims in Mediation

By Plan Type[1] and Fiscal Year of Receipt

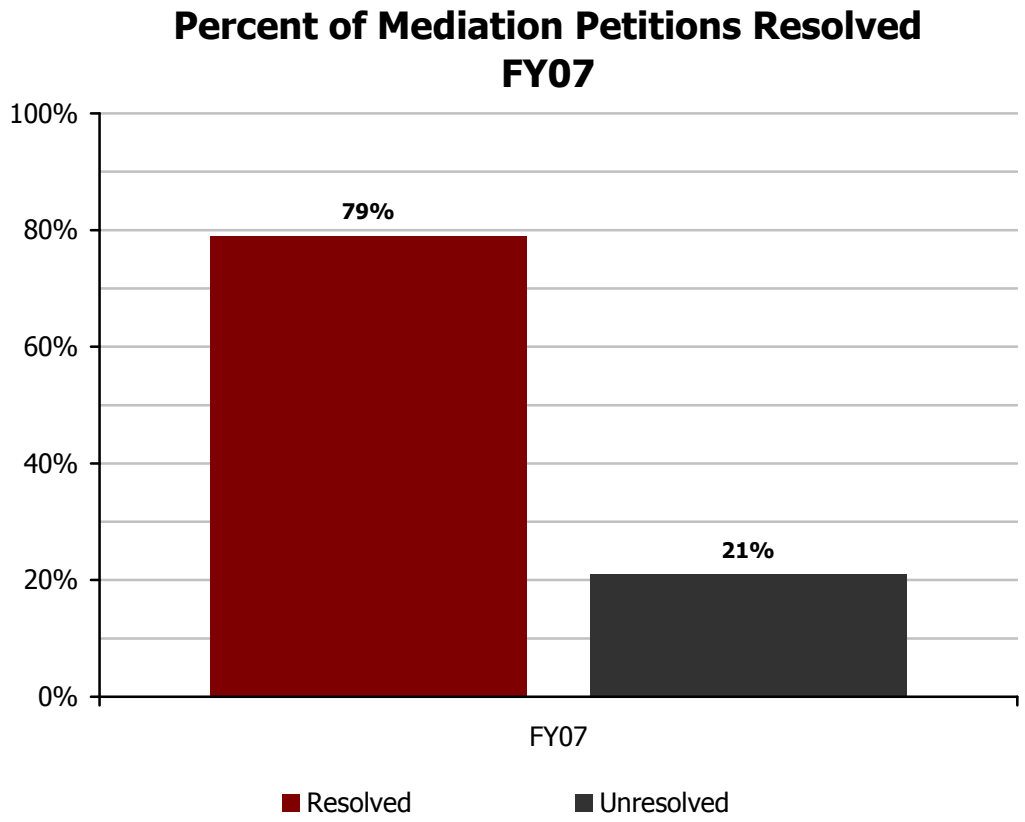
	FY03		FY04		FY05		FY06		FY07	
Plan Types	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**
Plan 1	244	18%	273	19%	270	17%	268	17%	243	16%
Plan 2	625	46%	577	41%	542	37%	588	38%	562	39%
Plan 3	451	33%	552	39%	622	43%	675	43%	645	43%
UEF	36	3%	16	1%	28	2%	28	2%	35	2%
Totals[2]	***1,356***	***100%***	***1,418***	***100%***	***1,461***	***100%***	***1,559***	***100%***	***1,485***	***100%***

Notes:

[1]Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund and UEF – Uninsured Employers Fund

[2]Total count represents the number of claims, not the number of petitions. Due to coverage and claim updates to our database following mediation, the claim counts may be changed slightly over prior years.

Exhibit 5.5



Over the past five years, the Mediation process has had an average resolution rate of 79%.

From the date of the petition receipt to issuing a written recommendation, the average completion time for mediation was 43 days in FY07.

Exhibit 5.6

Mediation Petitions[1]

By Fiscal Year of Receipt

Petitions Received	FY03		FY04		FY05		FY06		FY07	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Pending[2]	0	0%	0	0%	0	0%	7	1%	138	11%
Closed	1,232	100%	1,303	100%	1,336	100%	1,403	99%	1,174	89%
Total Petitions Received	***1,232***	***100%***	***1,303***	***100%***	***1,336***	***100%***	***1,410***	***100%***	***1,312***	***100%***
Resolved	975	79%	1,002	77%	1,032	77%	1,141	81%	931	79%
Unresolved	257	21%	301	23%	304	23%	262	19%	243	21%
Total Petitions Closed	***1,232***	***100%***	***1,303***	***100%***	***1,336***	***100%***	***1,403***	***100%***	***1,174***	***100%***

Notes:

[1]A single petition may include multiple claims and/or multiple insurers.

[2]Eventual outcome of pending petitions will affect percent resolved.

Contested Case Hearings

The DLI Hearings Bureau holds contested case hearings. Disputes heard at contested case hearings include appeals from orders and determinations issued by ERD, assessments of penalties for uninsured employers, medical disputes between providers and insurers when payments to the claimant are not an issue and regulation of attorney fees. The Legislature transferred responsibility for hearing occupational disease claims to the WCC in FY98. In FY07, the Hearings Bureau received 15 new requests for contested case hearings.

Exhibit 5.7

Petitions Received by the Hearings Bureau- FY07

By Plan Type[1]

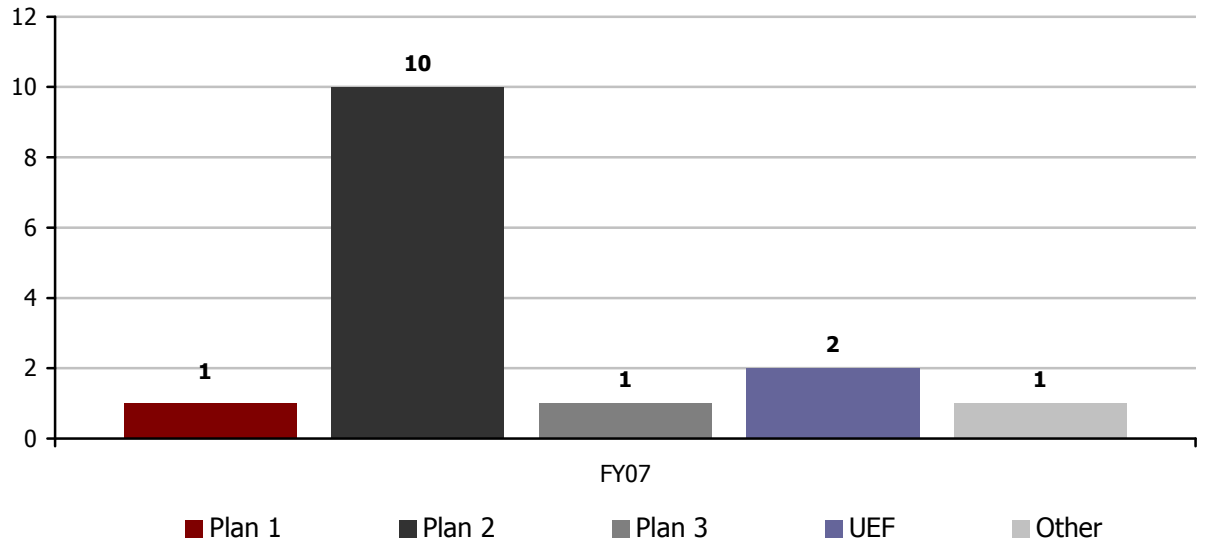


Exhibit 5.8

Petitions Received by the Hearings Bureau

By Plan Type[1] and Fiscal Year

	FY03		FY04		FY05		FY06		FY07	
Plan Type	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**
Plan 1	1	5%	0	0%	0	0%	1	10%	1	7%
Plan 2	6	32%	5	36%	3	28%	0	0%	10	67%
Plan 3	3	16%	7	50%	4	36%	7	70%	1	7%
UEF	9	47%	2	14%	4	36%	2	20%	2	13%
Other	--	--	--	--	--	--	--	--	1	6%
Total	***19***	***100%***	***14***	***100%***	***11***	***100%***	***10***	***100%***	***15***	***100%***

Notes:

[1]Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund, UEF – Uninsured Employers Fund and Other.

Workers' Compensation Court

The WCC resolves disputes between insurers or employers and workers disabled as a result of occupational injuries or diseases. The court has original jurisdiction over benefit issues arising under the Workers' Compensation Act. For an injury occurring after July 1, 1987, disputes must first be mediated. The court's exclusive jurisdiction also extends to disputes involving independent contractor exemptions under both the Workers' Compensation and Unemployment Insurance Acts, enforcement of DLI subpoenas, civil penalties for violations of workers' compensation provisions and the two-year return to work preference specified in section 39-71-317(2), MCA.

Court statistics were taken from the Workers' Compensation Court Website: http://wcc.dli.mt.gov

Exhibit 5.9

Percent of Petitions Received by the WCC - FY07

By Plan Type[1]

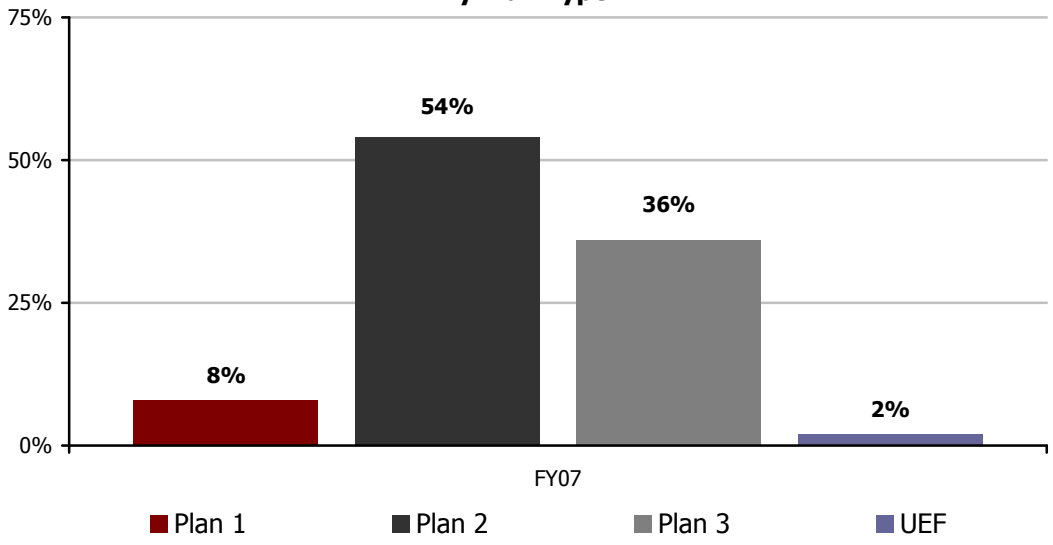


Exhibit 5.10

Petitions Received by the WCC

By Plan Type[1] and Fiscal Year

	FY03		FY04		FY05		FY06		FY07	
Plan Type	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**
Plan 1	34	15%	28	11%	40	14%	34	11%	18	8%
Plan 2	139	59%	144	55%	124	45%	150	49%	122	54%
Plan 3	53	22%	75	29%	96	35%	108	36%	81	36%
UEF	9	4%	14	5%	18	6%	12	4%	4	2%
Total by Plan[2]	***235***	***100%***	***261***	***100%***	***278***	***100%***	***304***	***100%***	***225***	***100%***

Notes:

[1]Plan types: Plan 1 – Self-Insured Employers, Plan 2 – Private Insurance, Plan 3 – Montana State Fund, SIF – Subsequent Injury Fund and UEF – Uninsured Employers Fund

[2]Petitions may involve more than one plan type.

Exhibit 5.11

Decisions by the WCC

By Fiscal Year

Decisions	FY03	FY04	FY05	FY06	FY07
Telephone Conference Resulting in Disposition	0	0	0	0	0
Bench Rulings without Written Decisions	0	1	3	1	0
Decisions	145	158	161	182	166
Orders on Appeal	0	0	1	1	0
Substantive Orders	32	30	41	27	19
Attorney Fee Orders	5	7	2	2	2
Orders on Cost	15	4	2	2	5
Subtotals	***197***	***200***	***210***	***215***	***192***
Petitions Dismissed by Agreement	72	88	83	96	80
Totals	***269***	***288***	***293***	***311***	***272***

Exhibit 5.12

Full and Final Compromise Settlements by the WCC

By Plan Type and Fiscal Year

Plan Type	FY03	FY04	FY05	FY06	FY07
Plan 1 - Self–Insured	5	7	1	1	7
Plan 2 - Private Insurers	12	13	6	6	8
Plan 3 - State Compensation Ins. Fund	24	17	10	15	7
Plan 5 - Uninsured Employers Fund	0	0	0	0	0
Total	***41***	***37***	***17***	***22***	***22***

Significant Workers' Compensation Court Cases

Case summaries are taken from the WCC Website: http://wcc.dli.mt.gov

MARTIN HETH, JR. vs. MONTANA STATE FUND
2008 MTWCC 19

Summary: Petitioner was in a single-vehicle accident involving the septic pumper truck he drove for his employer. Petitioner's blood-alcohol content (BAC) tested at .0874 shortly after the accident and beer cans were found in and around the truck. Respondent argued that it is not liable for Petitioner's workers' compensation claim because alcohol was the major contributing cause of the accident. Petitioner argued that alcohol was not the major contributing cause of the accident, and in any event, his employer knew that he drank alcohol on the job and therefore he is not barred from recovery under § 39-71-407(4), MCA.

Held: Although Respondent proved that alcohol was the major contributing cause of the accident, Petitioner proved that his employer knew he used alcohol while performing his job duties. Therefore, Petitioner is eligible for workers' compensation benefits.

DEBRA STAVENJORD vs. MONTANA STATE FUND
2008 MTWCC 17

Summary: Respondent moved for reconsideration of this Court's Order Regarding Identification and Notification of Potential Beneficiaries, arguing that since the Court found its process to be "well thought-out and reasonable," it was not impracticable or impossible for the identification and notification procedure to commence without common fund counsel and therefore this Court should reconsider its determination that it could not comply with the Montana Supreme Court's remand order to that effect.

Held: The Court determined as a threshold issue that it was impossible to determine an acceptable identification and notification procedure for potential *Stavenjord* beneficiaries since, without common fund status, the Court has no jurisdiction to order non-party insurers to comply with the procedure. Therefore, irrespective of the fact that Respondent's proposed procedure appears to the Court to be "well thought-out and reasonable," the Court is unable to comply with the Supreme Court's directive on remand until such time as the Supreme Court clarifies whether the term "potential Stavenjord beneficiaries" is limited to ***only*** those claimants whose employer was insured by Respondent. Motion for reconsideration is therefore denied.

CARLON FIRST STRIKE vs. MONTANA CONTRACTOR COMPENSATION FUND
2008 MTWCC 9

Summary: Respondent moved to compel Petitioner to attend an independent medical examination. Petitioner argues that since Respondent already denied liability for his claim, Respondent is not entitled to further investigation.

Held: Under § 39-71-605(2), MCA, Respondent is entitled to obtain an IME because a dispute exists concerning the claimant's physical condition and/or the cause or causes of any injury or disability the claimant may have.

ANGIE SIZEMORE vs. COPPER KING HOTEL AND CONVENTION CENTER
2008 MTWCC 8

Summary: Respondent moved to dismiss Petitioner's petition in which she requested that the Court enforce the reemployment preference of § 39-71-317, MCA, against The Cimarron Group, Inc., which now owns the Copper King Hotel and Convention Center. Petitioner was employed at the Copper King Hotel and Convention Center when it was owned by Allegra Partnership, and Allegra Partnership owned the business on the date of Petitioner's industrial injury.

Held: Under § 39-71-317(3), MCA, a claimant's reemployment preference lies with her date-of-injury employer. Since Petitioner's place of employment was owned by Allegra Partnership and not The Cimarron Group, Inc., on the date of her injury, her entitlement to a reemployment preference lies with Allegra Partnership and not The Cimarron Group, Inc. Respondent's motion to dismiss is therefore granted.

CARL "CHRIS" YOUNG vs. MONTANA STATE FUND
2008 MTWCC 2

Summary: On August 15, 2005, Petitioner sent a demand letter to Respondent, requesting payment of a permanent partial disability (PPD) award pursuant to *Reesor v. Montana State Fund*. The following day, the Montana Supreme Court ruled in *Otteson v. Montana State Fund* that PPD awards were not payable to permanently totally disabled claimants and thus Petitioner was not entitled to receive the PPD benefits paid by Respondent. Respondent nonetheless paid Petitioner a PPD award on August 22, 2005. Respondent requested return of these funds on November 21, 2005. Petitioner refused, and Respondent began recouping the PPD award by reducing Petitioner's biweekly benefits by $23.78. Petitioner argues that for equitable reasons, Respondent is not entitled to the return of the PPD award.

Held: Insofar as Petitioner changed his position for the worse based upon his belief that Respondent had paid him a PPD award and would not request its return, Respondent is equitably stopped from recouping that portion of the erroneous payment from Petitioner. Therefore, of the $16,625 Respondent erroneously paid to Petitioner, Respondent is entitled to reduce Petitioner's biweekly benefits to recoup a total of $10,529.

RICH BARNEA vs. ACE AMERICAN INSURANCE COMPANY
2007 MTWCC 58

Summary: On May 17, 2004, Petitioner was injured while lifting a heavy beam as part of his job duties as a boilermaker. At the time, he primarily felt pain in his lower back and right hip. However, he also asserted that he had neck and shoulder pain which worsened significantly over time and when he decreased his pain medication. Petitioner's treating physician did not make note of Petitioner's neck and shoulder pain until July 21, 2004, although he later asserted that Petitioner had complained of neck and shoulder pain at the outset. A January 23, 2006, cervical MRI revealed a herniated disk or protrusion, and surgery was recommended. Respondent denied liability for Petitioner's neck and shoulder condition.

Held: Although Petitioner's neck and shoulder pain was not mentioned in Petitioner's medical records until two months after the industrial accident, the Court has no reason to doubt the assertion of Petitioner's doctor that he had simply failed to record it as he was focused on Petitioner's more severe lumbar complaints. Furthermore, Petitioner's subsequent treating physician also opined that Petitioner's cervical and shoulder conditions were likely caused by the industrial accident. Respondent is therefore liable.

BARRY SHELLEY vs. AMERICAN HOME ASSURANCE COMPANY
2007 MTWCC 52

Summary: Respondent moves for dismissal of the petition in this case because it alleges that Petitioner failed to file a written claim for benefits within a year of when he knew or should have known that he suffered from an occupational disease and therefore Petitioner's claim is untimely pursuant to § 39-71-601, MCA (2005). Petitioner responds that he did not need treatment for his condition until 2005, and therefore the statute of limitations did not begin to run until that point.

Held: Respondent's motion is granted. Petitioner filed a district court action in 2001 alleging that he suffered from an asbestos-related condition as a result of his employment with Respondent's insured. However, he did not file an occupational disease claim until January 2006. The fact that Petitioner alleged he did not exhibit symptoms

or require treatment for his condition until December 2005 does not negate the fact that he knew at least as early as the time when he filed the district court action that he suffered from a work-related occupational disease.

DEB HAMAN vs. WAUSAU INSURANCE COMPANY
2007 MTWCC 49

Summary: Respondent moved to compel Petitioner to attend a follow-up independent medical examination (IME) with Dr. Gregg Singer. Petitioner argues that a follow-up IME is unnecessary. As this motion specifically pertains to Dr. Singer, Petitioner argues that, in conducting the previous IME, Dr. Singer ignored her complaints of pain and pushed her to the point where she was in pain for several days after the examination. Moreover, Petitioner alleges that Dr. Singer did not note her pain complaints in his IME report. If the Court grants Respondent's motion to compel, Petitioner moves for a protective order to allow petitioner's husband to be present during the entire examination and to videotape the examination.

Held: Respondent's motion to compel is granted. The Court finds good cause to allow a follow-up examination with Dr. Singer. Petitioner's motion for a protective order is granted in part and denied in part. Petitioner's husband may not be present for the examination. However, Petitioner's counsel may be present for both the history-taking portion of the IME and the examination itself. The entire IME will be recorded by a fixed video camera.

RICHARD A. SIEBKEN vs. LIBERTY NORTHWEST INSURANCE COMPANY
2007 MTWCC 48
Appealed to the Montana Supreme Court on January 17, 2008

Summary: Petitioner was involved in a work-related physical altercation on December 11, 2004. He reported the incident to his supervisor the same day, but did not report any injury because he did not know he was injured. On May 26, 2006, he learned that he had a cervical condition which was likely caused by the altercation. Petitioner filed a claim for compensation on July 3, 2006. Respondent argues that it is not liable for Petitioner's condition because Petitioner did not report an accident and injury within 30 days as required by § 39-71-603, MCA.

Held: Petitioner failed to notify his employer within 30 days of when he learned that his work-related incident was the probable cause of his injury. His claim is therefore time barred under § 39-71-603, MCA.

MONTANA MUNICIPAL INSURANCE AUTHORITY vs. JOHN E. ROCHE, JR.
2007 MTWCC 47
Appealed to the Montana Supreme Court January 15, 2008

Summary: Petitioner alleges that Respondent received a "wage" from a business which he ran as a sole proprietor during the time that Respondent received TTD benefits from Petitioner, and that Respondent did not have Petitioner's consent to do so as required by § 39-71-701, MCA. Respondent denies that he received a "wage" from his business because he asserts that the business is not profitable and does not generate an income.

Held: Respondent received a wage from his business because he used business assets for personal use and wrote checks from his business account to pay personal loans. The fact that the business is not profitable according to Respondent's income tax returns has no bearing on whether Respondent himself received a "wage" from the business as that term is defined in § 39-71-123, MCA. Therefore, Respondent was not entitled to the TTD benefits he received and must repay those benefits to Petitioner.

JOHN PORTER vs. LIBERTY NORTHWEST INSURANCE CORPORATION
2007 MTWCC 42

Summary: Petitioner injured his back in an industrial accident for which Respondent accepted liability. Petitioner sought chiropractic treatment and subsequently alleged that the treatment aggravated a preexisting cervical condition. Petitioner ceased to treat with the chiropractor and began to treat with a physician who had previously treated his cervical condition without Respondent's approval to change treating physicians. Months after he last treated Petitioner, the chiropractor declared him to be at MMI and released him to his time-of-injury job without restriction. The chiropractor withdrew that opinion when he learned Petitioner had treated with other doctors. Prior to filing this lawsuit, Petitioner's counsel requested a complete copy of Respondent's claims file and Respondent provided only certain material until compelled to remit the remainder pursuant to subpoena. Petitioner moved this Court to adopt guidelines to compel insurers to turn over claims files upon request. Petitioner further alleged that Respondent's adjusting of his claim was unreasonable.

Held: Petitioner failed to prove that the chiropractic treatment aggravated his preexisting cervical condition. Except for the chiropractor's withdrawn opinion, no doctor has found Petitioner to be at MMI and he is therefore entitled to TTD benefits retroactive to the date of termination. Respondent's refusal to reinstate TTD benefits in light of the lack of a doctor's opinion that Petitioner was at MMI or released to return to work is unreasonable and Petitioner is therefore entitled to a penalty. Respondent's adjustment of

this claim, taken as a whole, was likewise unreasonable and Petitioner is entitled to his attorney fees. This Court has no jurisdiction to set forth the claims file guidelines Petitioner desires because it does not have jurisdiction over a claim until a petition has been filed.

CHARLES LANES vs. MONTANA STATE FUND
2007 MTWCC 39
Notice of Appeal filed November 7, 2007

Summary: Although Respondent accepted liability for Petitioner's left knee occupational disease, it has denied liability for Petitioner's subsequent occupational disease claim for his right knee. At the time of his left knee claim, Petitioner worked as an electrician for Respondent's insured. At the time of his right knee claim, Petitioner worked as a minister. Respondent alleges that Petitioner's church is the employer of last injurious exposure. Petitioner contends that his work for his church did not permanently aggravate his right knee condition.

Held: The aggravation to Petitioner's right knee caused by his work as a minister was merely temporary additional pain that would alleviate with rest and does not constitute a significant aggravation or contribution. However, Petitioner's work as an electrician significantly aggravated or contributed to his right knee condition. Therefore, Respondent, as the insurer of the employer where Petitioner suffered his last injurious exposure, is liable.

DENNIS HAND vs. UNINSURED EMPLOYERS' FUND and G. JON ROUSH d/b/a SWITCHBACK RANCH,
Employer
2007 MTWCC 33

Summary: Petitioner has been totally disabled due to an occupational disease since January 15, 1993. In the late 1980s, Petitioner's employer gave him twenty-five head of breeding cattle in lieu of future wage increases. Petitioner's employer also provided pasture year round, provided hay in the winter, medical supplies, veterinary services, and breeding bulls for the cattle. Petitioner contends that the offspring of these cattle should be included as wages in determining his total disability rate.

Held: The value of the calves born from the twenty-five head of cattle given to Petitioner by his employer in the late 1980s are not wages for the purpose of determining Petitioner's total disability rate. However, the value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls for the twenty-five head of cattle provided to Petitioner by his employer are wages for the

purpose of determining Petitioner's total disability rate. The parties shall calculate the actual value of these services and supplies for the year preceding Petitioner's last day of work and factor that amount into the calculation for determining Petitioner's total disability rate.

STEVEN SCHOENEMAN vs. LIBERTY INSURANCE CORPORATION
2007 MTWCC 28

Summary: Petitioner moved for summary judgment, requesting reinstatement of his temporary total disability benefits because Respondent terminated them without 14 days' written notice. Respondent argues that it was paying these benefits pursuant to § 39-71- 608, MCA, and because Petitioner was not at maximum medical improvement when his treating physician released him to work in some capacity, § 39-71-609(2), MCA, allows an insurer to terminate temporary total disability benefits without notice.

Held: Petitioner's motion for summary judgment is granted. Respondent bases its case on reading a single sentence of a statute out of the context of the remainder of the statute and the Workers' Compensation Act as a whole. The Court is not persuaded by this interpretation.

CASSANDRA SCHMILL vs. LIBERTY NORTHWEST INSURANCE CORPORATION
2007 MTWCC 27

Summary: On December 11, 2006, this Court ordered the parties to brief certain unresolved issues. On July 9, 2007, the Special Master appointed by the Court issued his "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 1006, Order of the Workers' Compensation Court."

Held: The "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court" dated July 7, 2007, are adopted:

> The retroactive application of Schmill involves the period from July 1, 1987, through June 21, 2001, inclusive. Unless otherwise excluded, all claims arising out of occupational diseases which were first diagnosed as work-related during this period should be identified, reviewed, and paid under Schmill, subject to specific objections that arise in particular cases or with regard to categories of cases.
>
> Excluded from the retroactive application of Schmill are cases which were settled through a department-approved settlement or court-ordered compromise of benefits.

Excluded from the retroactive application of Schmill are cases in which a final judgment was entered by the WCC, and that judgment is not pending on appeal to the Montana Supreme Court, if the circumstances of the particular judgment indicate that the underlying occupational disease claim is no longer actionable. However, the Special Master reserves ruling on specific Class V issues until presentation of specific claims or until interested parties present particular classes of "judgment" situations for negotiation or ruling.

Neither the doctrine of laches nor any particular statute of limitations limits the retroactivity of cases in the implementation period noted above.

Claims handled by the UEF are subject to the retroactive application of Schmill, though the UEF may later argue that reduction in payment on particular claims is necessary pursuant to statutory mandate.

NELS OKSENDAHL vs. LIBERTY NORTHWEST INSURANCE CORPORATION
2007 MTWCC 24
Notice of Appeal Filed July 9, 2007

Summary: Petitioner suffers from arthritis in his thumbs, which his treating physician and an IME doctor both opine would have developed irrespective of his employment. However, both doctors agree that Petitioner's employment probably aggravated or accelerated his thumb condition. Petitioner and Respondent both argue they are entitled to summary judgment as a matter of law as to whether Petitioner's thumb condition is a compensable occupational disease.

Held: Petitioner's motion for summary judgment is granted. Respondent's Motion for Summary Judgment is denied. Petitioner had been a carpenter all his life, the last five years of which were working for Respondent's insured. Both of the doctors who offered opinions stated that Petitioner's work aggravated this condition. The test for causation of an occupational disease is whether Petitioner's employment constituted a significant aggravation or significant contribution to his condition. Petitioner has established that the aggravation or contribution was significant.

NICHOLAS J. MARKOVICH vs. LIBERTY NORTHWEST
2007 MTWCC 21

Summary: When Petitioner neared the completion of an 84-week vocational rehabilitation plan which allowed him to get a master's degree, he asked Respondent to pay for additional schooling so he could complete a thesis which would make him eligible for a

Ph.D. program. Respondent refused. Petitioner petitioned this Court for additional vocational rehabilitation benefits, additional benefits under § 39-71-703, MCA, additional auxiliary benefits, and attorney fees and a penalty for Respondent's actions from the day of Petitioner's injury until the present.

Held: Petitioner has not suffered a wage loss that would entitle him to PPD benefits under § 39-71-703, MCA, because he is now qualified to earn more than he earned at his time of injury employment. Petitioner is not entitled to an additional vocational rehabilitation plan, nor is he entitled to auxiliary benefits for travel in excess of the $4,000 which Respondent has paid. Petitioner is not entitled to attorney fees or a penalty.

BONITA FOSTER vs. MONTANA SCHOOLS GROUP INSURANCE AUTHORITY 2007 MTWCC 18

Summary: Petitioner sustained a left knee injury on September 6, 2005, while employed by Respondent's insured, Evergreen School District. On October 27, 2005, Petitioner underwent a left knee arthroscopy with a partial medial meniscectomy. On November 22, 2005, Petitioner was released to full duty by her treating physician. On December 20, 2005, Petitioner returned to her treating physician noting severe pain and catching in her left knee. Ultimately, an MRI conducted on May 19, 2006, showed evidence of an avascular necrosis of the subchondral area of the lateral femoral condyle. Petitioner contends that the avascular necrosis is causally related to either her injury of September 6, 2005, or the medial meniscectomy of October 27, 2005. Alternatively, Petitioner contends that an additional arthroscopy should be authorized to determine whether she has sustained a repeat meniscal tear. Respondent has denied liability, contending that Petitioner has failed to establish a causal relationship between the avascular necrosis and her industrial injury. Respondent also contends that Petitioner has failed to establish on a more-probable-than-not basis that she has sustained a repeat meniscal tear.

Held: Petitioner has failed to establish on a more-probable-than-not basis that the avascular necrosis is causally related to either her injury of September 6, 2005, or her arthroscopy of October 27, 2005. With respect to the possibility of a repeat meniscal tear, Petitioner has likewise failed to establish on a more-probable-than-not basis that such an injury exists. The MRI conducted on May 19, 2006, showed no evidence of a tear, and her treating physician's testimony that there may be a 5-10% chance that the MRI may have missed it does not satisfy Petitioner's burden of proof.

DALE ALDRICH vs. MONTANA STATE FUND
2007 MTWCC 57
Appealed to the Montana Supreme Court on January 15, 2008

Summary: Petitioner petitioned this Court for an award of temporary total disability (TTD) benefits during the period of Petitioner's medical instability resulting from an occupational disease, notwithstanding the age or Social Security retirement status of Petitioner. Respondent argues that Petitioner is not entitled to TTD benefits because he has failed to prove an actual wage loss.

Held: Petitioner is not entitled to an award of TTD benefits. Pursuant to § 39-71-701, MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing. In this case, at the time Petitioner contends he was no longer at maximum healing, he had not worked for approximately eleven years and had been drawing Social Security retirement benefits for approximately two years. None of the facts presented to this Court establish that Petitioner suffered any wage loss as a result of his injury when he was no longer at maximum healing. Petitioner, therefore, has failed to meet his burden of proof that he was entitled to receive TTD benefits.

BOBBY DRIGGERS vs. LIBERTY NORTHWEST INSURANCE CORPORATION
2007 MTWCC 60
Appealed to Montana Supreme Court January 28, 2008
Appeal Dismissed March 14, 2008

Summary: Petitioner moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent opposed the motion and cross-motioned for summary judgment, contending that Petitioner failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requested an award of attorney fees, costs, and a penalty.

Held: Petitioner's motion for summary judgment is granted and Respondent's crossmotion for summary judgment is denied. Respondent is correct that both parts of the twopart test set forth at § 39-71-407(3)(a)(i), MCA, must be satisfied for Petitioner's injury to be compensable. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies the second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions to the going and coming rule. This Court fails

to appreciate any notable distinctions between the present case and the cases of *McMillen*, *Ellingson*, and *Gordon*, which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job. To the extent that there is any distinction between the present case and the Montana Supreme Court's decisions in *McMillen*, *Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court also finds Respondent's denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

Supreme Court Decisions on Workers' Compensation and Occupational Disease

These decisions can be found at the State Law Library Website: www.lawlibrary.state.mt.us

Wilkes vs. Mont. State Fund
Appeal from the WCC. Affirmed.

Wilkes worked part-time as a school bus driver, and ran a farm as a sole proprietor. On the farm, he did not elect to cover himself under workers' compensation. On March 26, 2002 he seriously injured his neck in the course and scope of driving the school bus. State Fund accepted the claim. Upon reaching MMI, Wilkes was able to return to light-duty bus driving at the same wage. He has not been able to return to heavy work of running his farm, and has been forced to lease it out. State Fund denied PPD benefits for wage-loss under § 39-71-703(5).

Wilkes argued that denying PPD benefits to workers who suffer reduced earning capacity, but who do not suffer actual wage loss, impermissibly compensates similarly situated workers differently. While acknowledging a thoughtful policy argument advanced by the claimant, the Supreme Court held that reliance on actual wage loss for determining PPD benefits pursuant to § 39-71-703 does not violate Wilkes's Constitutional rights to equal protection.

Sturchio vs. Wausau Underwriters
Appeal from the WCC. Affirmed.

When injured on June 11, 2005, Sturchio was employed by five concurrent employers, each with a different payment method. Wausau argued that only one method of calculation should be used for all concurrent employments.

The Supreme Court agreed with the WCC. It held that the only interpretation that honors the plain language of § 39-71-123, MCA (2003), and furthers the legislative policy that wage-loss benefits "bear a reasonable relationship to actual wages lost" is applying subsection (3)(a) and (b) to each concurrent employment, using the statutory method best suited to each employment individually; and then using the resulting figures to calculate the employee's aggregate average actual wage

Kessel vs. Liberty Northwest Insurance

Appeal from the WCC. Affirmed.

Former employee filed a claim for benefits for an occupational disease from asbestos exposure. The WCC held the claim was not time-barred.

The Supreme Court agreed with the WCC, finding the language in § 39-72-602 (1999) required an occupational disease panel evaluation before a dispute can be presented to the WCC. The statute of limitations in § 39-71-2905(2), MCA (1995-2003) does not commence running until after the occupational disease panel report is issued.

The Court acknowledged this interpretation could result in an OD claim being open for an indeterminate time after discovery of the medical condition. But the Court wrote that due to changes in law, the ruling will only apply to those OD cases arising prior to June 30, 2005, where medical evaluations have already occurred.

BeVan vs. Liberty Northwest Insurance

Appeal from the WCC. Affirmed.

BeVan was injured in a vehicle accident while she was on a work break and returning from feeding her dog at her house. WCC found that her injury was compensable.

The Supreme Court found that because BeVan was on an authorized paid break, rather than a personal errand, the *Carillo* analysis applies, and not *Strickland* or § 39-71-407(3), MCA (2003). *Carillo v Liberty* established a four-factor analysis to determine whether an employee's injury while on break is compensable; (1) whether the employee was paid during the break; (2) whether the employment contract entitled the employee to the break; (3) whether restrictions limited where the employee could go during the break; and (4) whether the employee's activity constituted a substantial personal deviation. The Court concluded the WCC had properly applied the analysis, concluding BeVan met the first 3 factors. For the 4th factor the Court specifically concluded that claimant's activity was not a substantial personal deviation, in part because she could not take her normal break because she was helping her employer's customers, nor could she go home on her usual lunch break because her employer required her to attend a meeting during that period.

The Court held that their focus, when considering whether an employee has substantially deviated from the scope of employment, encompasses both the employee's activity and the benefits the employer derives.

Michalak vs. Liberty Northwest Ins. Corp.,
Appeal from the WCC. Affirmed.

Michalak was seriously injured while attending a company picnic, when riding a wave runner. The insurer denied his claim on the basis that the injury did not occur within the course and scope of his employment. The WCC applied the four-factor "course and scope" of employment analysis per *Courser v Darby Schools*. It found that the picnic was undertaken at the employer's request; the employer compelled the employee's attendance; the employer controlled or participated in the picnic; and the employer and its employees mutually benefited from the picnic. There were no findings that the employee acted recklessly or negligently in riding the wave runner or that he abandoned his employment. Michalak's injury was compensable because he had not been relieved of his prescribed duties and thus was acting in the course and scope of his employment.

The Supreme Court held that the WCC properly applied the *Courser* analysis. The WCC properly focused its analysis on the company picnic as the "activity", rather than Michalak's ride on the wave runner, to determine whether his injury occurred in the course and scope of his employment. The Court declined the insurer's invitation to overrule *Courser* in light of the legislature's repeal of the "liberal construction" provision in the Workers' Compensation Act.

Thompson vs. State
Appeal from the WCC. Reversed.

The workers sought a declaratory judgment stating that the claimant disclosure provisions in § 39-71-604(3) and § 50-16-527(5), MCA, (2003), violated their right to privacy and their right to due process of law. The workers did not raise a specific benefit dispute. The Supreme Court found the WCC had authority to issue declaratory rulings only in a dispute concerning benefits. § 27-8-311, MCA, did not authorize the award of attorney's fees and costs against the State.

Gamble vs. Sears
Appeal from the WCC. Affirmed.

On May 16, 1997, Gamble was injured in the course and scope of her employment. The claim was accepted. In May 2001, Gamble and her employer entered into a settlement agreement to resolve the claim. In 2004, Gamble was diagnosed with an odontoid fracture. The WCC found credible medical evidence that the fracture existed undiagnosed in 1998, and was caused by the 1997 accident. The WCC rescinded the settlement agreement based on a mutual mistake, reopening the employee's claim.

The Court agreed with the WCC finding that the parties were mistaken regarding a material fact, and properly rescinded the settlement agreement. The Court also held that the employer was not absolved of all liability for the medical costs because Gamble failed to obtain prior authorization. The procedural authorization rule of § 39-71-1101(2) MCA, allows the insurer an opportunity to choose a treating physician if the claimant no longer prefers the doctor he or she initially chose; it does not operate as an escape mechanism by which the insurer can avoid all liability of the cost of undisputedly necessary treatment arising from a work-related injury.

United States Court of Appeals for the Ninth Circuit

Siaperas vs. Montana State Compensation Insurance Fund
Appeal from the US District Court for the District of Montana. Affirmed.

Claimant severely injured her back on August 17, 1996. Her workers' compensation claim was accepted and she was determined to be permanently totally disabled. Her weekly workers' compensation benefit rate was capped at $384. She applied for and received SSDI benefits. The State Fund executed a reverse offset against her SSDI benefits, of 50%. After the reverse offset, her combined benefits totaled less than 80% of her average current earnings (ACE). Siaperas sought to establish this violates 42 U.S.C. §424a(a). The Court held because § 424a does not establish a combined benefit floor of 80% ACE, no conflict occurs when § 39-71-702(4) causes a combined benefits award to be less than 80% ACE. The Court also considered whether Montana law was preempted by § 424a. The Supreme Court's *Richardson* decision recognized a lack of intent to occupy the field of disability benefits when it stated that if there is any overlap between a federal disability insurance program and a state workers' compensation program, "workmen's compensation programs should take precedence . . . ." *Richardson*, 404 U. S. at 82.